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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 UNITED STATES OF AMERICA, et al.,

11 Plaintiffs,

12 v.

13 STATE OF WASHINGTON, et al.,

14 Defendants.

CASE NO. CV 9213

Subproceeding No. 01-02

ORDER ON MOTION FOR A
PROTECTIVE ORDER

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16 This matter is before the Court for consideration of the Samish Indian Nation's ("Samish") second
17 motion for a protective order (Dkt. # 187). This motion has been opposed by the United States of
18 America ("United States") and by the Lummi Nation ("Lummi"), the Swinomish Indian Tribal
19 Community ("Swinomish"), the Upper Skagit Indian Tribe ("Upper Skagit"), the Tulalip Tribes
20 ("Tulalip"), and the Port Gamble and Jamestown S'Klallam Tribes ("S'Klallam") (together, the "Treaty
21 Tribes"). For the reasons stated below, the motion shall be denied.

22 DISCUSSION

23 This motion concerns two memos written by counsel for the Samish: one dated July 17, 1998 and
24 addressed to the Samish Tribal Council, and one dated October 26, 1999 and addressed to Vernon
25 Peterson, then Assistant Regional Solicitor for the United States. Copies of these memos were provided
26 by Samish counsel to the United States to support the Samish request that the United States either
27 provide representation for the Samish in these proceedings, or provide federal funds to hire an attorney.

1 25 C.F.R. § 89.40, 43. Pursuant to these regulations, a tribe requesting such assistance must provide
2 background information to explain why the claim it wishes to assert in litigation has merit. *Id.*

3 By letter dated September 20, 1999, Mr. Peterson, Assistant Regional Counsel, stated to counsel
4 for the Samish,

5 I would like to take you up on your offer to provide additional information. . . . I recognize
6 that you may not want to share confidential attorney work product. If the memorandum is
7 confidential I would not be able to assure you it would be protected from release under the
8 Freedom of Information Act or pursuant to discovery in *U.S. v. Washington*, if you did
provide me a copy. However, understanding your views regarding the legal basis or bases
for seeking relief from judgment under Rule 60(b) would be very helpful to our office in providing
legal advice to the Assistant Secretary on the issues raised in the Tribe's letter.

9 Declaration of Craig Dorsey, Exhibit B. Counsel states that "I informed my client [the Samish] that
10 "disclosure of the documents could potentially waive attorney client privileges, but that we would claim
11 the privilege. My client believed the issue important enough to risk waiving the privilege." Declaration
12 of Craig Dorsay, ¶ 4. Subsequently, the United States declined to provide representation for the Samish
13 in this matter. *Id.*, ¶ 5.

14 During discovery in this subproceeding, the United States produced copies of these two
15 documents to the Samish in response to a discovery request. These discovery responses, including
16 copies of the two documents, were also provided to other parties in this subproceeding. The Samish
17 now assert that these documents are protected by attorney-client privilege; they ask that all outstanding
18 copies be returned to them, and that the adverse parties be foreclosed from using these documents in this
19 subproceeding or any other. Both the United States and the Treaty Tribes oppose this request.

20 Counsel for the Samish contends that the privilege was asserted when the documents were
21 provided to the United States, and that he and Mr. Peterson reached a verbal agreement which was
22 "memorialized" in Mr. Peterson's September 20, 1999, letter. Declaration of Craig Dorsey, Exhibit C.
23 However, there is no evidence in the record that the privilege was ever asserted in writing. Further, the
24 language of the September 20 letter does not reflect any understanding or agreement, but rather advises
25 counsel that confidentiality cannot be assured, specifically referencing discovery in this case as well as the
26 Freedom of Information Act. Counsel also acknowledges that the Samish assumed the risk of waiving
27 attorney-client privilege, believing that the possible benefit of litigation funds made that worthwhile.

1 It is not necessary for the Court to determine whether these two documents are actually subject to
2 attorney-client privilege,¹ because the Court finds that any attorney-client privilege that attached to the
3 documents was waived by their disclosure to the United States. The Samish argue that this would be an
4 unfair result, given that the United States has now aligned itself with the Treaty Tribes. However, the
5 Court notes that under the cited regulation it was not necessary for the Samish to provide these actual
6 documents in requesting litigation funds; all that is required is “a detailed statement describing the nature
7 and scope of the problems for which legal services are sought,” as well as a detailed financial statement.
8 25 C.F.R. § 89.43(a). By providing the actual documents, after being advised by the United States that it
9 could not assure they would be protected from discovery, the Samish waived any attorney-client privilege
10 that existed as to these two documents.

11 The motion for a protective order is accordingly DENIED.

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13 Dated this _15_ day of August, 2006.

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16 RICARDO S. MARTINEZ
17 UNITED STATES DISTRICT JUDGE
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27 ¹Counsel for the Samish himself described the attorney-client privilege status of these two
28 documents as “uncertain” in an April 28, 2006 letter to counsel for the Treaty Tribes. Declaration of
Craig Dorsey, Exhibit A.